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Washington, D.C. Office

May 16, 2000

The Honorable Tom Bliley
Chairman
Committee on Commerce
U.S. House of Representatives
Room 2125, Rayburn House Office Building
Washington, D.C. 20515-6115

Re: Further Questions and Answers on H.R. 2944

Dear Chairman Bliley:

Thank you for your letter of April 25 requesting that NARUC further clarify its views on H.R. 2944, legislation to restructure the electric industry. Attached please find our responses to the questions posed in your letter along with additional attachments containing our Association's recently adopted positions on Federal restructuring legislation.

While we have tried to be as detailed and complete as possible in our answers, there is one overarching point I would make. In November, Subcommittee Chairman Barton spoke to NARUC's members, challenging the Association to continue working on the issues raised in H.R. 2944 with the goal of developing compromise positions responsive to the views of other parties with very different ideas on the role States should play in a restructured industry. As our answers to your questions document, we have taken that challenge seriously, particularly in the areas of transmission jurisdiction and reliability where the Association has modified our earlier positions to respond to suggestions that FERC's role be expanded. We have sought to work in good faith with all parties to this debate to develop solutions on these difficult issues, and will continue to do so in the future.

Thank you again for the opportunity to comment on these important issues. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Charles D. Gray
Executive Director

Enclosures

cc: Cathy Van Way, Majority Staff
Sue Sheridan, Minority Staff

NARUC Response to Chairman Bliley – May 16, 2000

1. Your letter, among others, raises concerns about Federal/State jurisdictional boundaries. Many other respondents felt that the jurisdictional boundaries between Federal and State regulators need further clarification. Please explain NARUC's interpretation of the provisions resolving Federal/State jurisdictional issues and the respective jurisdictions of Federal and State regulators?

Answer: The following is NARUC's understanding of section 101 of H.R. 2944's resolution of Federal/State jurisdictional issues:

a) Existing State authority to determine whether to require retail competition through unbundling of transmission and local distribution service is preserved (§ 101(a));
b) FERC authority is extended to retail transmission services that are unbundled (§ 101(b));
c) Existing State authority over all other retail services, including bundled sales, local distribution component of an unbundled sale, and the retail sale itself (i.e. the commodity) in the case of an unbundled sale is preserved (§ 101(b));
d) Existing State authority to establish delivery charges to fund a list of public purposes is preserved (§ 101(d));
e) Authority claimed by FERC in Order No. 888 to determine the character of power delivery facilities (i.e. whether transmission or distribution) is codified (§ 101(e));
f) Existing State authority over retail sales and/or distribution services provided to U.S. government facilities is preserved (§ 101(f))

NARUC believes that a workable and effective resolution of Federal/State jurisdictional issues is critically important to any restructuring legislation. Indeed, NARUC has worked extensively on the subject of jurisdiction since FERC adopted Order No. 888. At its last meeting in March, NARUC adopted by resolution (attached hereto) a model which bridges the gaps between the present jurisdictional divide and provides for both efficiency and nondiscrimination in the market while avoiding centralizing further authority in the Federal government at the expense of the States and of retail customers.

NARUC's proposal would provide for State jurisdiction over all retail deliveries of electricity over transmission lines, whether bundled or unbundled, while FERC would maintain exclusive jurisdiction over wholesale sales. A State would have to follow policies of nondiscrimination and guidelines established by federal legislation as interpreted by FERC. This is similar to models which the Congress

already established to address jurisdiction both in the Public Utilities Regulatory Policy Act of 1978 and most recently in the Telecommunications Policy Act of 1996. NARUC would further agree to a "FERC backstop" appellate process which would be available to any party who felt that the State's actions were in violation of the nondiscrimination open access policies of federal law.

Significantly, our position recognizes by that States must not interfere with non-discriminatory wholesale open access service along with the need to provide nondiscriminatory retail access for those States that have moved to full customer choice. On the other hand, it avoids FERC having to become embroiled in the complexity of setting transmission rates for individual retail customer classes (each having peak usage of the transmission system at different times of the day and different seasons of the year), avoids citizens having to come to Washington for resolution of transmission rate or service issues, and allows the States the flexibility they need to tailor electricity policy to their specific regional needs subject to an overarching federal open access policy. It also would avoid the significant rate shifting (and resulting impact on State tax revenues) that would definitely occur should FERC be provided jurisdiction over retail transactions, whether bundled or unbundled. Such rate shifting and tax revenue losses would occur as a result of substituting FERC-determined wholesale rates for the present transmission rates embedded in bundled retail rates, each of which differ by customer class. By definition, substituting a "one size fits all" rate for the different retail rates presently paid by retail customers will lead to rate shifting among customer classes, among different utilities within a State and potentially by region.

NARUC intends to work with all parties on specific legislative language. One potential construct of this language would be as follows:

"FERC shall not exercise authority over retail transmission service except to resolve complaints alleging discrimination in the application of the open access provisions of this Act by a particular State. States shall ensure open, nondiscriminatory use of the transmission systems within their State for deliveries of electricity for resale to retail customers on a bundled or unbundled basis in accordance with State law and the requirements of this legislation."

2. Chairman Hoecker's comments on H.R. 2944 stated that "H.R. 2944 fails to adequately address the jurisdictional problem evidenced by the Eighth Circuit's recent holding in Northern State's Power Co. v. FERC...." Do you agree or disagree? How should Federal legislation address this issue?

Answer: NARUC is unaware of any provisions included in H.R. 2944 that were specifically intended to address the holding in this case that the Federal Power Act does not provide FERC jurisdiction to "regulate the curtailment of electric transmission on native/retail consumers...." However, to the extent that section 101 of H.R. 2944 provides FERC authority over transmission services provided to retail consumers on an unbundled basis, the legislation would change the result in the NSP case as to those services.

NARUC supported the result in this case when it was on rehearing at the Court of Appeals. It is our view that any legislation Congress enacts should affirm State authority to regulate retail power delivery services. As our answer to Question 1 describes, if such authority is exercised in ways that cause undue discrimination against market participants – including the authority to regulate retail curtailment policies – then FERC should have authority to act to remove such discrimination.

3. Does NARUC believe that requiring utilities to unbundle transmission rates will force a State to move to retail competition? Is it possible for a utility in a State that does not have retail competition to completely unbundle its transmission services?

Answer: Requiring utilities to unbundle transmission will not – as a matter of law – automatically force States to move to retail competition provided that the legislation makes clear that that is not congressional intent. It is possible for a utility in a State without retail competition to provide transmission services on an unbundled basis.

NARUC opposes federal legislation that would force States to unbundle retail service and transfer jurisdiction over retail transmission service to FERC, other than the appellate-type authority described in our answer to Question 1.

4. FERC issued Order 2000 urging the formation of voluntary Regional Transmission Organizations (RTOs) after Subcommittee action on H.R. 2944. What is NARUC's position on that rule? Do you believe that there is a need for independent operation of the interstate transmission grid to assure competition in wholesale markets? Are States in a position to assure that independence?

Answer: As a general matter, NARUC supports Order No. 2000. We support independence as a hallmark of RTO policy. Working with FERC, States can help assure independence as part of the process of implementing Order No. 2000. However, there is a threat to State action in this area based upon recent utility claims that State efforts to encourage or direct utilities to join a given

RTO, and to establish conditions on their participation, are preempted by FERC's "exclusive jurisdiction" over transmission services and facilities. We recommend that Congress clarify that nothing in Federal law works to defeat State actions that support Federal policies favoring the development of FERC-jurisdictional RTOs. For example, a number of States such as California, Illinois, Ohio, and Virginia have adopted policies as an element of their retail restructuring initiatives that require utilities to participate in RTOs. We urge Congress to support and facilitate these kinds of pro-competitive State policies.

5. Is it possible for efficient and effective RTO's to form if States retain jurisdiction over bundled transmission services and rates?

Answer: NARUC believes it is possible for efficient and effective RTOs to focus on wholesale transmission services notwithstanding State jurisdiction at the retail level. The benefit of preserving State jurisdiction is to enable State commissions to take local needs into account. As Order No. 2000 is implemented, regionalism will continue to grow in importance. Accordingly, NARUC strongly supports the parallel development of cooperative regional regulatory mechanisms to support non-discriminatory, open-access transmission services.

6. Chairman Hoecker's comments on H.R. 2944 highlight that H.R. 2944 would limit FERC's authority to undertake the initiatives contained in Order 2000. Is that your interpretation? Would you support modifying H.R. 2944 to make clear that FERC's Order 2000 could be implemented?

Answer: We do not believe that the legislation unnecessarily limits FERC's authority to implement the Commission's overarching policy of non-discriminatory access to wholesale transmission services through the development of RTOs. However, as noted, NARUC supports Order No. 2000, and accordingly, would not object to appropriate amendments deemed necessary to facilitate implementation of that order.

7. H.R. 2944 places a 180 day time limit on FERC's consideration of mergers. Some respondents argued that such a limit would result in FERC arbitrarily rejecting mergers based upon inadequate time for full consideration of the merger proposal. Does NARUC support the time limit on merger consideration?

Answer: NARUC does not support a strict time limit. The legislation should enable FERC to extend any statutory review period for good cause.

8. Does NARUC support the provisions regarding transmission expansion currently contained in H.R. 2944?

Answer: In March, NARUC adopted its position on siting of expanded transmission capacity which "supports voluntary regional bodies to address siting" issues. We further stated that "Congress should provide an explicit grant of authority to the States and FERC to act in cooperation" in this area. "Congress should affirm that States have the primary authority to set up, operate and govern these voluntary regional siting bodies, and FERC would act as an appropriate 'backstop' authority where States or regions fail to act." Provisions of section 105 of H.R. 2944 that would authorize joint boards appear to address the same need for coordinated multistate action.

We believe that the position adopted by our Association in March represents a significant step for NARUC to take to develop a workable compromise on the siting issue, particularly with respect to the role that FERC would play in cases where State and regional siting decisions are not forthcoming.

9. NARUC has expressed some concerns about the consensus reliability language contained in H.R. 2944. Please provide legislative language that would address NARUC's concerns.

Answer: NARUC cannot support the so-called "consensus" reliability language developed by the North American Electric Reliability Council (NERC) as reflected in H.R. 2944 without amendment to provide an explicit and appropriate role for the States. To that end, we advocate the addition of two amendments (attached hereto). The first is a "savings" clause to clarify that existing State authority to ensure reliable service is not preempted by the NERC legislation unless a State's action is found by FERC to have a material adverse impact on reliability of the bulk power system or is greater than necessary to meet the State's reliability needs. The second is an amendment to allow States to form regional advisory bodies (with deference from FERC when acting on an interconnection-wide basis) to address reliability standards. With these amendments, provisions in H.R. 2944 with respect to the New York State Reliability Council (proposed FPA Section 218(h)(1)) and State authority over reliability of the distribution network (proposed FPA Section 218(n)) are unnecessary and should be deleted.

Given the increasing attention that the States, FERC, Congress and the Administration have given to reliable electric service, we wish to make very clear that NARUC has worked diligently with NERC (and for that matter, all other stakeholder groups that are interested in finding a solution on this issue) to find a compromise that recognizes the legitimate interest of the States in ensuring reliable service of the electrical systems and facilities now being

used to support expanding commercial activities. In our view, the amendments we have attached reflect significant movement in the direction of a workable compromise – movement we have yet to see from other participants in this debate.

10. Your letter expresses support for provisions that grandfather State programs. Could you describe NARUC's interpretation of H.R. 2944's grandfathering provisions? How do the grandfathering provisions work in relation to the Federal/State jurisdictional boundaries drawn by the legislation?

Answer: There appear to be at least two grandfather provisions in H.R. 2944. Section 3 states "that any State law or regulatory order adopted before the date three years after the date of enactment" shall be grandfathered, provided that the law or order addresses consumer protection issues covered by Title III, interconnection issues covered by section 532, aggregation issues covered by section 219 and net metering issues covered by section 702. Section 107(b) is a savings clause stating that nothing in the legislation preempts "any State retail access plan" adopted or implemented within three years of enactment.

In relation to "the Federal/State jurisdictional boundaries drawn by the legislation," Section 3 acts as a limit on the application of Federal law to State decisions in the four listed areas – consumer protection, interconnection, aggregation and net metering – that are adopted within 36 months of the date of enactment. State-jurisdictional utilities would be required to comply with State decisions made during the three-year period, notwithstanding Federal requirements in these areas.

Section 107(b) would constitute a rule of construction to be used by a court reviewing a State commission requirement (that is part of the State's retail access plan) that is alleged to implicate a provision of the Federal Power Act as amended by this legislation. The purpose of this kind of savings clause is to make clear to reviewing courts that Congress does not intend that the Federal legislation "occupies the field." In the case of this formulation, this means that as a general matter, utilities subject to State regulatory jurisdiction must comply with State requirements found in a retail access plan unless compliance with the Federal Power Act makes it impossible to do so. A party objecting to the State requirement would bear the burden of proof on this issue.

11. Your letter expresses support for a "State-Federal partnership to support State and utility public benefits funds..." Please provide specific legislative language that you would support on this issue.

Answer: In its March resolution, NARUC adopted a more detailed statement of its policy on public benefits legislation that establishes "a Federal/State trust, funded by a non-bypassable, competitively neutral customer charge." The fund would be administered by an independent entity, and participating States would qualify for Federal matching funds "by designating its own program and funding mechanism for its match." We are working to develop specific legislative provisions to implement this policy. This amendment will be provided to the Committee as soon as we've completed our work.

12. H.R. 2944 is silent with respect to privacy issues. Does NARUC have a position on privacy issues?

Answer: In fact, Section 302 of H.R. 2944 would establish consumer privacy rules under the administration of the Federal Trade Commission. This section would prohibit the disclosure of customer-specific information without the customer's "prior written approval." This "opt-in" provision is generally consistent with NARUC's approach both with respect to electricity issues, and also telecommunications issues.

However, there are two other aspects of Section 302 that are troublesome: first, section 302(c) (dealing with disclosure of aggregated customer information) should allow customers to petition their distributor to block the release of aggregate information that is competitively sensitive; i.e. if a given customer's information is discernible from the aggregated data and its disclosure would affect the customer's competitive position.

In its March resolution (attached), NARUC adopted the following position on consumer privacy and information disclosure: "Congress should provide that aggregated consumer information should be made available by the local distribution company . . . upon request and payment of a reasonable fee." A retail customer that believes disclosure by his or her distribution company will cause competitive harm should be able to request that information not be disclosed. Disputes over the release of information should be resolved under State commission policies and procedures.

Second, section 302(e) should be amended to make clear that State requirements that are more prescriptive or provide greater consumer protection are not preempted. We believe that Congress should make clear that such State requirements are allowed by deleting the "not inconsistent" language of this subsection. Specifically, we recommend that the first sentence of section 302(e) be revised by deleting the phrase "so long as such laws, regulations, or procedures are not inconsistent with the provisions of this section or with any rule prescribed by the Federal Trade Commission pursuant to it."

13. Please explain NARUC's position with respect to inclusion of uniform interconnection standards in Federal legislation? Does NARUC support the development of uniform interconnection standards? Please provide the authorizing language NARUC requests in its letter to "give States the authority to implement interconnection policies that make sense for the unique circumstances that individual States confront."

Answer: NARUC supports congressional legislation that requires the establishment of national interconnection and power quality standards, developed and adopted by appropriate technical standards organizations, such as the Institute of Electrical and Electronics Engineers, Inc., by a date certain. We further believe that the legislation should place the responsibility for implementation of these standards at the State level, and further, should permit States to adopt or modify the standards to meet local needs. We have not yet developed specific legislative language to implement this position.

13. Your letter is silent with respect to aggregation. What is NARUC's position with respect to aggregation provisions in H.R. 2944?

Answer: Section 531 of H.R. 2944 adds a new Section 219 to the FPA, creating a Federal right of aggregation. This provision is only partially consistent with NARUC's position, reflected in the attached policy resolution adopted in March of this year, that States should have the authority to determine "the terms and conditions upon which aggregation is available," and further, that Congress should affirm "that aggregators are subject to State licensing, registration and consumer protection requirements." We recommend that Section 219 be revised to specify that these State policies are not preempted through the amendment of the first sentence as follows:

"Subject to not unduly discriminatory or preferential State requirements, *including licensing, registration and consumer protection laws and regulations,* each retail electric consumer may designate ...."

Additional language in italics.

14. Your letter states NARUC "supports further consultation between Federal agencies and State commissions to produce enforceable uniform standards for information disclosure and product labeling." Please elaborate. How would the grandfathering provisions affect such a standard?

Answer: NARUC has worked with the National Council on Competition and the Electric Industry (a joint effort among state and federal utility regulators,

legislators, and energy officials) and the U.S. Department of Energy to conduct research on the effectiveness of various information disclosure formats and policies. This research led to the development of a model information disclosure policy for implementation by the States.

To date, 17 States that have opened their markets to retail competition have adopted disclosure policies, although the details of these policies vary from State to State (for example, California shows fuel mix but no air emission information). In addition, two States that have not yet opened their markets to retail competition have adopted disclosure policies. Further consultation between Federal agencies and State commissions is likely to encourage additional States to adopt disclosure policies, as well as to help ensure consistency among these policies.

Under the grandfathering provision of Section 3, States that have adopted disclosure policies (either prior to or within three years of enactment) would be free to continue implementing and enforcing these policies.

15. Your letter seems to express support for Federal legislation with respect to "slamming" and "cramming" as long as it allows States to implement more stringent consumer protection policies. Is this a correct interpretation of NARUC's position? Would the grandfathering provisions of H.R. 2944 prohibit enforcement of, or allow States to "opt out" of enforcement of Federal "slamming" and "cramming" laws within their jurisdiction?"

Answer: As a general matter, NARUC believes that congressional legislation in the area of consumer protection – including remedies for slamming and cramming – should provide that States are free to prescribe and implement enforcement policies that "are more prescriptive than Federal requirements." States are the first line of defense against consumer fraud and abuse. As we have learned in telecommunications and as we are learning in energy restructuring, NARUC's member commissions, along with State attorneys general, are the agencies that consumers call for assistance, that handle complaints, and that must provide necessary remedies against firms that will not comply with legal requirements. Any legislation developed by Congress in this area must preserve the front-line role of the States.

Concerning the effect of the grandfather provisions in this area, it would appear that section 3 of H.R. 2944 means that in a grandfathered State, all entities (including utilities, consumers, marketers etc.) would be governed by State law and procedures in grandfathered areas (consumer protection, interconnection, aggregation and net metering) rather than a Federal standard established under the corresponding provisions of the legislation.

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16. Please elaborate on your position on the repeal of PUHCA and PURPA. What legislative proposals would NARUC offer to modify those provisions in H.R. 2944?

Answer: Concerning PUHCA, NARUC supports reform or repeal of the statute as competition becomes effective under comprehensive legislation. We also support State and FERC access to holding company books and records and preservation of consumer protection provisions of the 1992 Energy Policy Act and 1996 Telecommunications Act (as codified in the attached amendatory provision).

Concerning PURPA, NARUC supports legislation to remove the statute's mandatory purchase requirement where a State has determined that generating markets are competitive or that the public interest in resource acquisition is protected. NARUC opposes legislative provisions that give FERC authority to order the recovery of PURPA contract costs or otherwise preempt State authority.

On the cost recovery issue, NARUC would offer the following language as an amendment to H.R. 2944:

SEC. 522. RECOVERY OF COSTS.

In order to assure recovery by electric utilities purchasing electric energy or capacity from a qualifying facility pursuant to any legally enforceable obligation entered into or imposed pursuant to section 210 of the Public Utility Regulatory Policies Act of 1978 prior to the date of enactment of this Act of all costs associated with such purchases, the Federal Energy Regulatory Commission ~~shall~~ may promulgate and enforce such regulations. *In such rulemaking, the Commission shall give deference to the existing applicable regulations implemented by state regulatory authorities* as may be required to assure that no utility shall be required directly or indirectly to absorb the costs associated with such purchases from a qualifying facility after the date of the enactment of this Act. Such regulations shall be treated as a rule enforceable under the Federal Power Act (16 U.S.C. 791a–825r). *Nothing in this section shall prevent or limit the authority of a state regulatory authority to require a utility to pursue the cost-effective buy-down or buy-out of an existing qualifying facility contract or any other prudent form of mitigation of costs associated with an existing qualifying facility contract.*

Additional language in italics.

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17. With respect to market power, your letter states that "the States are capable of resolving market power issues, provided legislation clarifies that State regulators have the authority to do so." Please provide legislative language that you believe achieves this result.

Answer: NARUC would offer the following language as an amendment to Section 101(a) of H.R. 2944 adds to section 201(b) of the Federal Power Act:

"This Act shall not affect the authority of a State or municipality to require retail electric competition, or to require the unbundling of transmission and local distribution service for the delivery of electric energy directly to a retail electric consumer *or to investigate and resolve the alleged abuse of market power by any entity subject to the regulatory jurisdiction of the State."*

Additional language in italics.

N A R U C

National Association of Regulatory Utility Commissioners

R E S O L U T I O N

Resolution Adopting
"Positions on Issues in Federal Legislation to Restructure the Electric Industry"

WHEREAS, Congress is in the process of developing legislation to restructure the electric industry; and

WHEREAS, The National Association of Regulatory Utility Commissioners (NARUC) established an Ad Hoc Committee on Electric Industry Restructuring and has been working with Congress and the various stakeholders to discuss and recommend appropriate federal policy with respect to restructuring; and

WHEREAS, The Ad Hoc Committee, through a number of conference calls and meetings has developed positions on some of the various issues that have been addressed in discussions and in pending legislation; and

WHEREAS, The NARUC will continue to develop its positions as the debate on electric industry restructuring moves forward; and

WHEREAS, It is now appropriate that the National Association of Regulatory Utility Commissioners (NARUC), as the national representative of the State regulatory commissions, outline its positions on the issues important in ensuring that legislation serves the interests of consumers, providers, the national economy and the public good; *now therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened at its March 2000 Winter Meeting in Washington D.C., hereby adopts the attached "Positions on Issues in Federal Legislation to Restructure the Electric Industry" and urges that Congress be guided by these positions as they develop new policies to govern the regulation, organization and operation of the electric utility industry.

Sponsored by the Ad Hoc Committee on Electric Industry Restructuring
Adopted by the NARUC Board of Directors March 8, 2000

Positions on Issues in Federal Legislation to Restructure the Electric Industry

1. **"Grandfathering"**

   - NARUC supports grandfathering the legislative and regulatory actions of those States that have elected to implement certain initiatives regarding retail competition. States should continue to have the authority to respond to the unique circumstances under their jurisdiction with regard to restructuring. NARUC also strongly supports the absence of a date certain mandate for States to enact restructuring.

2. **Reciprocity**

   - NARUC opposes any provisions prohibiting utilities in non-retail access States from making sales in retail access States.
   - Reciprocity requirements are contrary to the very purposes of retail access, which are to create an open market to allow consumers the widest possible choice. Reciprocity limits the number of competitors that are available to lower prices and improve services.
   - Reciprocity requirements would tend to force States that have not yet elected to open up their retail markets to do so. This policy is inconsistent with NARUC's previously stated position that States should continue to have the authority to respond to the unique circumstances under their jurisdiction with regard to restructuring.
   - Reciprocity provision will result in increased confusion as to entities to whom the prohibition would apply. For example, when providers of electricity serve consumers in more than one State, some of which have retail access and some which do not, questions arise as to whether a company would be allowed to offer service in a State with full retail access.
   - A reciprocity provision would impede interstate commerce, raising constitutional issues.

3. **Interstate Compacts**

   - NARUC supports voluntary regional bodies to address siting of transmission facilities.
   - Congress should provide an explicit grant of authority to the States and FERC to act in cooperation.
   - States should be primarily responsible for forming these entities with only limited intervention from FERC.
   - Congress should affirm that States have the primary authority to set up, operate and govern these voluntary regional siting bodies, and FERC would act as an appropriate "backstop" authority where States or regions fail to act.

4. Reliability

- NARUC supports legislation establishing mandatory compliance with industry-developed reliability standards and providing explicit authority to FERC and the States to cooperate to enforce those standards.
- NARUC also supports legislation that includes workable mechanisms to support energy efficiency programs that enhance reliability
- NARUC **cannot** support reliability legislation that fails to provide a continuing role for States in ensuring reliability of all aspects of electrical service, including generation, transmission, and power delivery services or results in FERC preemption of State authority to ensure safe and reliable service to retail consumers.
- Congress should expressly include in legislation: (1) a savings clause to protect existing State authority to ensure reliable transmission service, and (2) a regional advisory role for the States
- NARUC is concerned that a savings clause limited only to "local distribution" could actually be harmful to consumers since it: (1) creates confusion over the responsibility to review service disruptions; (2) implicitly supports the view that legislation preempts State regulation of nondistribution related reliability; and (3) raises the question that NERC (a non-governmental entity) might otherwise cover distribution issues

5. Mergers

- NARUC supports a merger policy where both Federal and State regulators thoroughly evaluate mergers to assess their impact on competition, access to transmission facilities and electric rates.
- NARUC supports merger policy that recognizes State authority to assess retail impacts.
- Congress should enable FERC to extend any statutory review period for good cause.
- NARUC believes that Congress should require prior FERC approval for mergers and acquisitions involving utilities or utility holding companies

6. Market Power

- Congress should not preempt jurisdiction in the States to address market power concerns, including the authority to require behavioral and structural remedies to address excessive market power.
- NARUC advocates a continuum of options, such as accounting conventions and codes of conduct, for the mitigation of market power, and urges Congress to preserve State flexibility to use these options as needed.
- Legislation should clarify the authority of the States to require and police the separation of utility and non-utility, and monopoly and competitive businesses, and to impose affiliate transaction and other rules to assure that electric customers do not subsidize non-utility ventures.

- Legislation should clarify that States have authority to require the formation of appropriate State, territory, and regional institutions where necessary to ensure a competitive electricity market.
- As market power abuse may require the application of well-tailored structural solutions, legislation should clarify that the States are authorized to require divestiture where appropriate and necessary.
- Congress should also clarify that State regulators have authority to ensure effective retail markets and should eliminate any barriers to the exercise of that authority by the States.

7. Aggregation

- Congress should affirm that States have authority to determine the terms and conditions of retail service, including the terms and conditions upon which aggregation is available.
- Congress should affirm that aggregators are subject to State licensing, registration and consumer protection requirements.

8. RTO/Transmission Jurisdiction

- NARUC supports legislation affirming State authority to regulate retail power delivery regardless of facilities used (transmission or distribution).
- NARUC opposes the expansion of FERC jurisdiction to include unbundled retail transmission service. States should retain authority to establish retail transmission rates unless they violate federally-determined open-access, non-discriminatory, competitive transmission policies. FERC should continue to have ratemaking authority for interstate wholesale transactions. FERC should have jurisdiction over transactions between suppliers and retail customers located in different States and it should be required to defer to States acting on a regional basis.
- States should be primarily responsible for expeditiously handling retail complaints alleging undue discrimination in the marketplace. Appeals by market participants may be made to the FERC.
- NARUC supports legislation to authorize States to form voluntary regional bodies to address regional transmission system issues.
- NARUC supports legislation leading to voluntary formation of RTOs. Deference should be given to States in RTO development.
- Congress should develop a mechanism for States to address ongoing concerns in RTO functions after the initial RTO development period. These interests include reliability, market monitoring, pricing, congestion management, planning and interregional coordination. FERC should provide deference to States acting on a regional basis.
- Congress should provide for a State commission advisory role in RTO governance that allows deference to State commissions that reach consensus concerning these issues.
- NARUC supports an appropriate Federal role to resolve disputes between States.

9. Consumer Protection

- Congress should not preclude a State or State commission from prescribing and enforcing laws, regulations, or procedures regarding consumer protection.
- States should be given the latitude to prescribe consumer protection measures that are more prescriptive than Federal requirements.
- Congress should provide that aggregated consumer information should be made available by the local distribution company to other electric suppliers upon request and payment of a reasonable fee. However, any retail customer who believes that disclosure of such aggregated information would reveal energy use information of a competitively sensitive nature has the right to request the local distribution company not disclose such information. Congress should affirm that any consumer privacy disputes are to be resolved by the State Commission using its own consumer protection.
- NARUC supports State authority to ensure that retail electric competition does not result in the loss or degradation of service to rural, residential, or low-income consumers.

10. PUHCA

- NARUC supports reform or repeal of PUHCA as competition becomes effective under comprehensive legislation.
- NARUC supports a mechanism that maintains State and Federal authority over holding company practices and preserves consumer protection provisions of recent legislation – the 1992 Energy Policy Act and the 1996 Telecommunications Act.
- NARUC supports reversal of *Ohio Power* decision and State access to books and records.
- NARUC opposes granting FERC authority to exempt companies from State books and records requirements

11. PURPA

- NARUC supports legislation to lift PURPA's purchase requirement where a State determines that generating markets are competitive or that the public interest in resource acquisition is protected.
- NARUC opposes FERC authority to order the recovery of costs in retail rates or to otherwise limit State authority to require mitigation of PURPA contract costs. States that originally approved these contracts are in a better position to address this issue than FERC.

12. Public Benefits

- Preservation of public benefits should be part of federal restructuring legislation.
- NARUC has identified many options to preserve public benefits. However, NARUC believes the best approach for Congress to follow during the transition to a competitive market is to establish a Federal/State trust, funded by a non-bypassable, competitively neutral customer charge. The fund could be administered by an independent entity.
- A State would qualify for the Federal match by designating its own program and funding mechanism for its match.

13. Distributed Generation/Net Metering

- NARUC supports Congress requiring the establishment of national interconnection and power quality standards, developed and adopted by appropriate technical standards organizations, such as the Institute of Electrical and Electronics Engineers, Inc., for facilities by a date certain.
- The States should have the flexibility to adopt these rules or their own rules.
- NARUC supports removing barriers to State implementation of net metering.

1. Add the following sentence to the definition of 'Electric Reliability Organization,' Title II, section 201 (a) (3) of H.R. 2944:

The Electric Reliability Organization shall have authority to develop, implement and enforce compliance with standards for the reliable operation of the Bulk Power System and shall not have such authority with respect to non-Bulk Power System facilities.

2. Amend the savings clause in Section 201 (n) of H.R. 2944, as follows:

(1) Nothing in this title shall be construed to preempt the authority of a State to take action to ensure the adequacy or safety of electric facilities or services within the State.

(2)(A) Nothing in this section shall be construed to preempt the authority of a state to take action to ensure the reliability of electric facilities within the state except where the exercise of such authority –

(i) has a material adverse effect on the reliable operation of the bulk power system, or

(ii) is greater than necessary to ensure the reliability of bulk power electric facilities within the state.

(B) The Electric Reliability Organization, an Affiliated Regional Reliability Entity, or another affected party may file a complaint with the Commission challenging a state's exercise of authority reserved under this section. Any party challenging a state's exercise of authority under (i) or (ii) shall do so within 60 days of final state action, and have the burden of proof. FERC shall not stay a state's action in any such challenge for more than 90 days.

SEC. XXX. **STANDARDS FOR DIVERSIFIED ACTIVITIES -**

(a) No public utility company may sell assets to an associate company if a rate or charge for the sale of electric energy or natural gas was in effect for such assets under the laws of any State unless each State commission having jurisdiction over the public utility company approves such sale.

(b) No public utility company may enter into a contract to purchase services or products from a company that is an affiliate or associate company of the public utility company unless each State commission having jurisdiction over the retail rates of such public utility company approves such contract. The requirements of this subsection shall not apply in any case in which the State or State commission concerned publishes a notice that the State or State commission waives its authority under this subsection.

(c) No public utility company that is subject to the jurisdiction of a State commission with respect to its retail electric or gas rates shall pledge or encumber any utility assets or utility assets of any subsidiary thereof for the benefit of an associate company.

(d) No public utility company that is subject to the jurisdiction of a State commission with respect to its retail electric or gas rates shall issue any security for the purpose of financing the acquisition, ownership or operation of an associate company. No public utility company that is subject to the jurisdiction of a State commission with respect to its retail electric or gas rates shall assume any obligation or liability as guarantor, endorser, surety, or otherwise by the public utility in respect of any security of an associate company.

(e)(1) No holding company shall acquire an interest in a foreign utility company unless each State commission having jurisdiction over the retail electric or gas rates of a public utility company that is an associate company of the holding company certifies to the Commission that such acquisition will have no adverse effect upon the consumers of such public utility company.

(2) For purposes of this subsection, the term "foreign utility company" means any company that --

(A) owns or operates facilities that are not located in any State and that are used for the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light, or power, if such company --

(i) derives no part of its income, directly or indirectly, from the generation, transmission, or distribution of electric energy for sale or the distribution at retail of natural or manufactured gas for heat, light, or power within the United States; and

(ii) neither the company nor any of its subsidiary companies is a public utility company operating in the United States; and

(B) provides notice to the Commission, in such form as the Commission may prescribe, that such company is a foreign utility company.

(f) Reciprocal arrangements among companies that are not affiliates or associate companies of each other that are entered into in order to avoid the provisions of this section are prohibited.